

Message

From: Wetherington, Michele [Wetherington.Michele@epa.gov]
Sent: 6/14/2019 3:37:14 PM
To: Gordon, Lisa Perras [Gordon.Lisa-Perras@epa.gov]; Bouma, Stacey [Bouma.Stacey@epa.gov]; Cooper, Jamal [cooper.jamal@epa.gov]
Subject: RE: GA Narrative Discussion

Yes, what I had for talking points pasted below, pretty much the same points. First and legally, IWR tells us to review whether the revision in effect changes/could change the ambient condition of the waterbody, as does the 4 part test FAQ that HQ made post-IWR. Then, it's a technical argument of how that may happen (allowing more color/turbidity/odor in the water before finding it to be unreasonable), which are your points 2 – 4 below.

Step 1

- Substantive vs. Non-substantive
 - EPA can't defer to state/state court, without litigation risk in 11th Circuit
 - [Miccosukee (S.D. FL only but informative) and JFPIRG (11th Cir) caselaw: EPA must determine whether revisions "in effect" change ambient condition of waterbody. Added word can allow more pollutants in waterbody. Why EPA made the 4 part test FAQs.
 - Many public comments said "unreasonably" is not a defined term and subjective, not a minor change.
 - Dictionary defn unreasonably: adjective, which modifies the next word
 - Adds a second layer of review by EPD: find interference than find unreasonable
 - Attachment of prior types of non-substantive changes in the Region
 - 2 prior uses of word in narratives, that relate to less than fishable swimmable uses.

Thanks,

Michele

From: Gordon, Lisa Perras
Sent: Friday, June 14, 2019 11:20 AM
To: Wetherington, Michele <Wetherington.Michele@epa.gov>; Bouma, Stacey <Bouma.Stacey@epa.gov>; Cooper, Jamal <cooper.jamal@epa.gov>
Subject: FW: GA Narrative Discussion

Okay, laying the groundwork to focus the conversation – see email to HQ below. All hands on deck for a strong front to articulate why it's substantive (something Trey immediately agreed to, and Jeananne). Michele, do you want to send us talking points so we're all fresh on why we agree its substantive? I think we've been saying:

1. IWR – EPA doesn't defer to the states
2. Region 4 consistency of what is non-substantive – commas, acronyms.
3. Previous use of the word, "unreasonable" for industrial use.
4. Plain reading of the words.

But are there other arguments, as well? I think steering clear of any arguments that involve the state court cases helps us. We typically view these when they come in and make the call. We don't typically look elsewhere to see if it's substantive, but let me know if you think otherwise.

From: Gordon, Lisa Perras
Sent: Friday, June 14, 2019 11:12 AM
To: Fleisig, Erica <Fleisig.Erica@epa.gov>; Ludwig-Monty, Sarah <ludwig-monty.sarah@epa.gov>; Cooper, Jamal

[<cooper.jamal@epa.gov>](mailto:cooper.jamal@epa.gov)

Subject: GA Narrative Discussion

Erica, Sarah,

Thanks for making the time to talk yesterday – much appreciated that everyone stayed late so we could fit that in.

To make sure that we meet all of the deadlines coming up, I thought it might be helpful to focus next week's call on the substantive vs. non-substantive discussion. Yesterday, Jamal walked through the decision flow chart that we use for reviews. The state and EPA are in agreement that this is a change to standards – there's no dispute there. So, the next step on the flow chart is whether it is sub v. non-sub.

We could walk through our review of why we find it substantive and talk through any questions you may have. If we can work through any issues regarding that, then we can move through to the next part of the decision tree, such as what types of 131.6 materials we would have expected to see so that we could do our review. Does that work for you guys? Looking forward to continuing the discussion.

Lisa

Lisa Perras Gordon
Clean Water Act and Hydrologic Alteration Coordinator
U.S. Environmental Protection Agency Region 4
Atlanta, GA
404.562.9317
gordon.lisa-perras@epa.gov